based on criteria similar to those applied by the Ninth Circuit in *Washington II* and would have affected the result had it occurred earlier.

a. The district court denied the motion on the ground that Rule 60(b)(6) generally is not available where no inadequacy or defect in the original proceeding is alleged. Pet. App. 58a. The court reasoned that the Samish had not been prevented "from adducing all evidence to support its claim to treaty fishing rights" in the *Washington II* litigation. *Ibid.* The court further concluded that relief was unwarranted because the Ninth Circuit's earlier rulings had established that federal acknowledgment served a legal purpose independent of treaty status and should not affect the finality of *Washington II*. *Id.* at 57a-58a.

b. The court of appeals reversed. Pet. App. 1a-41a. It held that Rule 60(b)(6) relief was appropriate because the Samish "were effectively prevented from proving their tribal status 'in a proper fashion'" in the *Washington II* litigation because of: "excessive delays and . . . misconduct" by the government in "withholding of recognition"; the government's "position in *Washington II* that federal recognition was necessary and that future federal recognition might justify revisiting the treaty rights issue"; and "the district court's erroneous conclusion that nonrecognition was decisive and wholesale adoption of the United States' boiler-plate findings of fact in *Washington II*." *Id.* at 16a (internal quotation marks omitted). The court of appeals further held that its earlier rulings distinguishing between treaty rights and federal recognition as an Indian Tribe had established only that recognition was unnecessary to establish treaty rights, not that it was *insufficient* to establish treaty rights. *Id.* at 12a, 16a-17a. In the court's

view, its precedents lead "to the inevitable conclusion that federal recognition is a sufficient condition for the exercise of treaty rights." *Id.* at 12a.

ARGUMENT

The United States agrees with petitioners that the result reached by the court of appeals is contrary to that court's previous decisions. This Court's review of the issues raised by the petition, however, does not appear warranted, at least at the present time.

1. When the Tulalip Tribe sought to intervene in *Greene I*, the court of appeals affirmed the denial of intervention on the ground that the determination whether the Samish qualify for federal recognition and the determination whether the Samish can exercise treaty rights present distinct issues. 996 F.2d at 976-977. The court explained that "the Samish may not gain fishing rights from federal recognition alone." *Id.* at 977. In *Greene II*, the court of appeals reiterated that the "recognition of the tribe for purposes of statutory benefits is a question wholly independent of treaty fishing rights." 64 F.3d at 1270. In the decision below, however, the court of appeals reasoned that "federal recognition is a sufficient condition for the exercise of treaty rights." Pet. App. 12a. That result is directly contrary to the court of appeals' previous decisions, and it calls into question the court's previous determination in those decisions that the litigation concerning the acknowledgment proceedings should go forward without the participation of the parties to *Washington I*.

The petitioner Tribes contend (Pet. 9-12) that their due process rights were denied when they were barred from intervening in the *Greene* litigation. The United States agrees that the decision below contradicts the

court of appeals' previous rulings and significantly undermines the holding of those previous decisions denying intervention. There nonetheless does not appear to be a compelling need for this Court's review at this time.

The court of appeals' decision addressed only the threshold question of whether there exist "extraordinary circumstances" permitting reopening of the *Washington II* judgment under Federal Rule of Civil Procedure 60(b)(6). The court of appeals' decision therefore did not itself affect the treaty Tribes' fishing rights or reallocate those rights. Accordingly, the court of appeals' decision does not effect a deprivation of property for purposes of petitioners' due process challenge. Furthermore, it would be quite novel to apply due process principles on behalf of other Tribes in the determination by Interior whether to recognize a group as a sovereign Tribe and thereby establish a government-to-government relationship with it. And the interaction of such recognition with litigation concerning treaty rights of other Tribes raises potentially complex issues that could render resolution of particular due process claims in that setting quite context-specific.[1]

In any remand, moreover, the district court must first consider Samish's compliance with the other limitations contained in Rule 60(b), including timeliness. The district court expressly declined to reach the question whether Samish's motion, which was filed more than five years after the Samish Tribe's federal recognition, was

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[1] The petitioner Tribes' due process claim assumes that Indian Tribes are "persons" for purposes of the Due Process Clause. Cf. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-324 (1966) (States are not "persons" under the Due Process Clause); *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 191-193 (1989) (Tribes are not "States" for purposes of the Interstate Commerce Clause).

filed "within a reasonable time." Fed. R. Civ. P. 60(b); see C.A. E.R. 19. Even assuming that the district court reopens the *Washington II* litigation, the treaty Tribes may assert a right to an opportunity to challenge Samish's claim to treaty successorship. See *Greene I*, 996 F.2d at 977 ("Even if they obtain federal tribal status, the Samish would still have to confront the decisions in *Washington I and II* before they could claim fishing rights. Federal recognition does not self-execute treaty rights claims."). But see Pet. App. 15a ("And although we have never explicitly held that federal recognition necessarily entitles a signatory tribe to exercise treaty rights, this is an inevitable conclusion."). In addition, the district court has yet to determine whether particular prior rulings concerning the allocation of treaty fishing rights and other matters could be revisited (and to what extent) in further proceedings, and what accommodations for respondent's asserted rights might be in order. See Samish Br. in Opp. 6 n.9, 7-8. Accordingly, there does not appear to be a compelling need for this Court's review at this time.

2. Petitioners correctly criticize (Pet. 12-19) the court of appeals' decision as a departure from the strict limitations on the availability of relief from a judgment pursuant to Federal Rule of Civil Procedure 60(b)(6). "Extraordinary circumstances" sufficient to warrant relief from a judgment generally do not exist when the moving party could have presented its case in the previous proceeding. See *Ackermann* v. *United States*, 340 U.S. 193, 198-201 (1950). The court of appeals, however, allowed relief under Rule 60(b) even though respondent was not prevented from demonstrating its treaty rights in the *Washington II* litigation. See Pet. App. 27a (Bea, J., dissenting).

There nonetheless does not appear to be a need for this Court's review because the court of appeals' decision indicates that it does not establish a broad rule concerning the circumstances in which Rule 60(b)(6) relief is available. The decision instead reflects the court's conclusion that the unusual circumstances of this particular case warranted a case-specific departure from that principle that would normally govern relief under Rule 60(b)(6). In particular, the court acknowledged "that the Samish had the opportunity to litigate the factual basis underlying the tribe's treaty status in *Washington II*," Pet. App. 15a-16a, but the court nonetheless found "extraordinary circumstances" to exist based on what it considered to be "the government's excessive delays and . . . misconduct in withholding of recognition from the Samish," the "government's position in *Washington II* that federal recognition was necessary and that future federal recognition might justify revisiting the treaty rights issue," and "the district court's erroneous conclusion that nonrecognition was decisive and wholesale adoption of the United States' boiler-plate findings fact in *Washington II*." Pet. App. 16a (internal quotation marks omitted). Although we do not agree with the court of appeals that those considerations justify relief under Rule 60(b)(6), the court of appeals' application of Rule 60(b)(6) in those particular circumstances does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2005

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NOV 1 - 2005

No. 05-445

In The

Supreme Court of the United States

THE LUMMI NATION, et al.,

Petitioners,

v.

SAMISH INDIAN TRIBE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent Samish Indian Nation[1] believes that petitioners have presented questions in their petition for certiorari that were not part of the case below and are not properly part of the case now. The Samish Indian Nation believes that the following questions frame the issues correctly, as those issues have actually been presented by petitioners.

1. Is congressionally delegated Executive Branch discretionary authority to determine whether an Indian entity should be recognized as an Indian tribe for purposes of the United States Constitution subject to limitation or judicial review under the political question doctrine other than as expressly provided for in federal acknowledgment procedures voluntarily adopted by the Executive Branch?

2. Is a fact-based, individual determination made pursuant to controlling United States Supreme Court and Ninth Circuit precedent under F.R.C.P. 60(b)(6) that extraordinary circumstances existed that effectively prevented a party from prosecution or defense of a previous action in proper fashion subject to review under other, inapplicable subsections of F.R.C.P. 60(b)?

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[1] The Samish Indian Tribe passed a revised tribal constitution in 2004 adapting the official name "Samish Indian Nation." Both this official name and the historic name of the Tribe, "Samish Indian Tribe," are used interchangeably.

LIST OF PARTIES TO THE PROCEEDING BELOW

The Samish Indian Tribe initiated sub-proceeding 01-2 before the District Court in *United States v. Washington*, Civ. No. 70-9213 (W.D.Wash.) by filing a motion to vacate a judgment against the Tribe under F.R.C.P. 60(b)(6). Twenty two Indian tribes with treaty status are presently parties in that proceeding. The United States of America and ten Indian tribes (Lummi Nation, Swinomish Indian Tribal Community, Skokomish Indian Tribe, Tulalip Tribes, Jamestown, Lower Elwha and Port Gamble Bands of S'Klallam Tribes, Puyallup Indian Tribe, Upper Skagit Tribe, and Suquamish Tribe) were active intervenors and participants in the District Court in opposition to the Samish Tribe's motion. The State of Washington took no position on the Samish 60(b)(6) motion. The United States and the same ten tribes filed briefs in opposition to the Samish Tribe's appeal to the United States Court of Appeals for the Ninth Circuit. The United States and nine tribes (Lummi, Swinomish, Tulalip, Jamestown, Port Gamble, Lower Elwha, Puyallup, Upper Skagit and Suquamish) filed petitions for rehearing and suggestion for rehearing en banc of the Ninth Circuit's January 5, 2005 decision in favor of the Samish Tribe. Two tribes, the Yakama Indian Nation and the Nisqually Tribe, filed amicus briefs in support of the petitions for rehearing and suggestion for rehearing en banc. Seven tribes (Tulalip, Lummi, Swinomish, Yakama, Upper Skagit, Port Gamble and Jamestown) filed the pending petition.[1]

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[1] One of petitioning tribes, the Yakama Indian Nation, participated only as amicus below and therefore is not qualified to file a petition for certiorari. *In re Leaf Tobacco Board*, 222 U.S. 578, 581 (1911).

RULE 29.6 STATEMENT

Respondent is a federally recognized Indian tribe that has no parents, and there are no publicly held companies that hold any stock of petitioner.

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BRIEF IN OPPOSITION

The Respondent, Samish Indian Tribe, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 394 F.3d 1152 (2005).

STATEMENT OF THE CASE

The decision of the Ninth Circuit Court of Appeals in *Samish Indian Tribe v. State of Washington*, 394 F.3d 1152 (9th Cir. 2005) ("*Samish Indian Tribe*") follows and is consistent with both prior precedent in *United States v. Washington*[2] and with the Ninth Circuit's previous Samish recognition related decisions.[3] There is no conflict between the *Samish Indian Tribe* decision and the decisions of other circuits regarding application and interpretation of F.R.C.P. 60(b)(6). The Ninth Circuit's application of this Rule to the unique factual circumstances of the Samish

[2] This brief will follow the nomenclature used by the Ninth Circuit in the *Samish Indian Tribe* decision to label the relevant *United States v. Washington* decisions. The original *U.S. v. Washington* decision, both district court and Ninth Circuit opinions, is referred to as "*Washington I*." 384 F.Supp. 312 (W.D.Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975). *See Samish Indian Tribe*, 394 F.3d at 1154. The original district court decision denying treaty status to the Samish Indian Tribe in 1979 is referred to as "*Washington II*." 476 F.Supp. 1101 (W.D.Wash. 1979). *Samish Indian Tribe*, 394 F.3d at 1153. The Ninth Circuit's 1981 decision affirming the denial of Samish treaty status is referred to as "*Washington III*." 641 F.2d 1368 (9th Cir. 198[illegible] *Samish Indian Tribe*, 394 F.3d at 1155.

[3] There are two such decisions, *Greene v. United States*, 996 F.2d 973 (9th Cir. 1993) ("*Greene I*"), and *Greene v. Babbitt*, 64 F.3d 1266 (9th Cir. 1995) ("*Greene II*").

Indian Nation was both proper and consistent with the law.

This case involves the Ninth Circuit's conclusion that the Samish Indian Tribe must be allowed to join the twenty two (22) other Indian tribes that presently enjoy treaty status and who are parties in the ongoing *United States v. Washington* proceeding in the United States District Court for the Western District of Washington. Seven of these twenty two tribes object to the decision of the Ninth Circuit and have petitioned this Court for certiorari of the decision,[4] claiming that recognizing the treaty status of an additional signatory Indian tribe would "dilute" their treaty fishing allocations. *See Greene I*, *supra*, 996 F.2d at 976 ("[Tulalip Tribes] argue that their treaty fishing allocations are threatened by dilution."); *Greene II*, *supra*, 64 F.3d at 1270 ("The Tulalip Tribe has participated in this litigation because of concern that recognition of the Samish as a Tribe could lead to Samish eligibility for treaty fishing rights in already over-fished fisheries.").[5]

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[4] The United States was a party in opposition to the Samish Tribe in the District Court and Ninth Circuit but did not submit a petition for certiorari in the present case. Petitioners have suggested that the Court solicit the views of the United States on their petition, Petition for Certiorari, p. 19, but the decision not to appeal speaks for itself. As will be discussed below, the *Samish Indian Tribe* decision has no effect on federal interests; in fact, it preserves the federal government's plenary authority over Indian affairs.

[5] Before economic considerations took precedence, *see Greene I*, *supra*, 996 F.2d at 976 ("An economic stake in the outcome of the litigation, even if significant, is not enough."), some of the tribes now opposing the Samish Tribe supported Samish treaty status. *See, e.g.*, Jamestown Klallam Tribe, Tribal Council Resolution # 64-82, Sept. 20, 1982 ("Whereas, the Jamestown Klallam Indian Tribe recognizes the

(Continued on following page)

Two separate categories of Indian tribes descended from treaty signatories obtained treaty status in the original and in subsequent *United States v. Washington* decisions: tribes that were federally recognized were automatically granted treaty status[6] while unrecognized tribes had to prove that they had continuously maintained an organized tribal structure. *Samish Tribe, supra*, 394 F.3d at 1155; *Washington I, II,* and *III*. Federally

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Samish Indian Tribe as the historical and legal successors to the Samish Indian Tribe on a Government-to-Government basis;"); *United States v. Washington*, No. 79-4447, Ninth Circuit Court of Appeals, Brief of Plaintiff Suquamish Indian Tribe in Support of Plaintiff-Intervenor Samish Indian Tribe, Nov. 15, 1979, p. 12 ("The Samish Tribe was a party to the Treaty of Point Elliott. . . . The district court's decision as to the Samish tribe should be reversed.").

[6] The District Court used virtually identical language in *Washington I* to confirm treaty status for every recognized tribe that became a party in *United States v. Washington*:

> The ___ Tribe is the present-day tribal entity which, with respect to the matters that are the subject of this litigation, is a political successor in interest to some of the Indian tribes and bands which were parties to the Treaty of _____. It is recognized by the United States as a currently functioning Indian tribe maintaining a tribal government on the _____ Reservation. This tribe is organized pursuant to section 16 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 987, 25 U.S.C. § 476. Its membership is determined in accordance with its Constitution and bylaws approved by the Assistant Secretary of the Interior on _____, 19__. Its present membership roll was approved by a representative of the Secretary of the Interior on _____, 19__. The tribe presently has approximately ____ members.

See Washington I, 384 F.Supp. 312, 360 (Lummi); 379 (Upper Skagit); 380 (Yakama) (W.D. Wash. 1974); *United States v. Washington*, 459 F.Supp. 1020, 1039 (Swinomish); 1039 (Tulalip); 1039 (Port Gamble) (W.D. Wash. 1974-75). The only variation in this wording regarded federal approval of a tribe's constitution and membership roll, and which federal official granted such approval.

recognized tribes did not have to prove that they had continuously maintained an organized tribal structure; federal recognition (with descendancy from a treaty signatory) was in and of itself "sufficient" to make this showing. *Samish Indian Tribe*, 394 F.3d at 1157-59. *See Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334 (9th Cir. 1996) (federally recognized tribe that walked away from treaty grounds does not have treaty rights).

The Samish Indian Tribe was wrongfully dropped in 1969 from an internal list of Indian tribes kept and used by United States Department of the Interior employees to determine which Indian tribes were federally recognized. *See Samish Indian Nation v. United States*, 419 F.3d 1355, 1373-74 (Fed. Cir. 2005) ("*Samish Indian Nation*").[7] The Samish Tribe did not know at that time that its federal recognition had secretly been "lost," and in 1972 made the first of four requests to the Department of Interior for confirmation of its status as a federally recognized tribe. *Samish Indian Tribe*, *supra*, 394 F.3d at 1155 ("The Samish had first sought federal recognition in 1972, three years after a Bureau of Indian Affairs ("BIA") employee removed the Samish from a list used to determine whether a tribe was federally recognized."). When the Samish

[7] Both 2005 Samish Court of Appeals decisions are consistent on this issue. The Ninth Circuit in *Samish Indian Tribe* stated the logical outcome arising from these facts – that if the Samish Tribe had been federally recognized at the time it sought treaty status in *United States v. Washington*, the tribe "would almost certainly have won the right to exercise its treaty fishing rights." 394 F.3d at 1159. The Federal Circuit Court of Appeals in *Samish Indian Nation* held that the Samish Tribe was historically federally recognized and should have been federally recognized at the time Samish intervened in *United States v. Washington*. 419 F.3d at 1374.